No. 1048.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM BAER EWING,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR REHEARING.

FRANK MCGOWAN,
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Attorneys for Petitioner.

Pernau Press.

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The attorneys for plaintiff in error, after carefully considering the opinion of this Honorable Court heretofore rendered and filed herein, think that with propriety they may ask this Court to consider whether this case be one in which it will be proper to grant a rehearing, and they respectfully petition your Honorable Court to grant a rehearing in this case for the reasons and upon the ground:

The principal contention is that the indictment does not directly allege that the use of the Post Office establishment was a part of the scheme. We concede that it appears inferentially from the indictment, but such does not satisfy the statute. On this point we believe that the Court has misapprehended the rule of United States v. Long, 68 Fed. Reporter, for the cases show that the rule of the long case is in harmony with the decisions that have passed on the question. The Long case practically decides that an indictment under Section 5480 alleging that the defendant devised a fraudulent scheme, "to be effected by opening correspondence " by means of the Post Office establishment", though following the language, is defective as failing to directly allege that defendant, as a part of the fraudulent scheme, designed its accomplishment through the instrumentality of the Post Office.

In United States v. Harris, 68 Fed. Reporter, it was held that an indictment under Section 5480 must *directly* allege that the fraudulent scheme itself included the intended use of the United States mail in its execution.

In United States v. Smith, 45 Fed. Reporter 462, the indictment reads:

> "Having devised, as aforesaid, the aforesaid scheme to defraud to be effected by opening correspondence * * * by means of the Post Office establishment of the United States * * * and in and for executing said scheme * * * deposited in the United States Post Office."

In that case it was held,

> "it is not charged directly that the scheme embraced the design to use the mails for its accomplishment, and the statement is made merely by way of recital. 'The purpose of the law is to prohibit mail facilities in aid of fraudulent schemes. It is not clear why the design to use the mails was required as a constituent element of the offense. Thereby the statute measurably defeats its purpose, since the mail may be used in aid of fraudulent purposes if the intent so to do was not part of the scheme to defraud."

Taking Stokes v. United States to establish the rule for the essential averments in an indictment of this kind this pleading, we respectfully submit, does not conform to the following: (2) "That they " must have intended to effect this scheme by open- " ing or intending to open correspondence with " some other person through the Post Office estab- " lishment", because "said scheme to defraud was " to be effected", is only the opinion of the pleader. By whom it was to effected is left to inference. There is no allegation of the intended use, and, therefore, this requirement of the Stokes case has not been complied with. To allege that a scheme to defraud was devised, and following it by a mere recital that it was to be effected by certain means are not the equivalent of the allegation of the indictment in the Stokes case. In the latter it was alleged the Post Office was to be used for the purpose of exe-

cuting such scheme, etc., and "pursuant to said conspiracy".

The misuse of the Post Office establishment is an essential part of the offense. Without it no crime has been committed under the statute. Being an essential feature, according to all rules of pleadings, it must be directly alleged. It cannot be left to inference nor doubtful allegation, nor do mere opinions of the pleaders satisfy the law.

The specific points against this indictment are:

1st. That it does not allege that the use of the United States mail was a part of the scheme to defraud.

2nd. That the use of the mails was not contemplated at the time the scheme was originated.

3rd. That it is not alleged by whom it was to be effected, nor is there anything in the indictment other than the mere opinion of the pleader to show that the use of the mail was ever contemplated in the scheme to defraud, or any logical connection between these two conditions.

It seems that the Court held in effect that the objections urged against the indictment in this case were sufficient within the rule of United States v. Long, but endeavored to distinguish that case from the cases cited in the opinion. With all due respect to the Court we submit that Culp v. United States, 82 Fed. 990, Hume v. United States, 118 Fed. 689, O'Hara v. United States, 129 Fed. 553,

Kellogg v. United States, 126 Fed. 323; and Durland v. United States, 161 U. S. 306, do not sustain the position of the Court expressed in the opinion for the very evident reason that the question involved in this indictment was not before the Court for consideration in the cases just cited. In Culp v. United States, *supra,* there was not involved the sufficiency of the indictment, nor was a similar question presented for consideration. So far as the record discloses, as we understand that case, the sole question before the Court at that time was whether or not the Act of March 2nd, 1889 (25 Stat. 873) repealed Section 5480 of the Revised Statues, or narrowed its scope to the schemes and artifices specified, for the Court therein declared:

> "Now we cannot assent to the proposition pressed upon us by counsel for the plaintiff in error that the Act of 1889 was intended to curtail the operation of the original enactment. No such limitation, we think, was contemplated or effected by the amendatory Act of 1889."

And in Hume v. United States, *supra,* the questions were, first, whether or not letters should be set out in the indictment. Second, the necessity for an allegation of mailing. Third, the date of the offense; and, Fourth, an allegation as to the time of the offense. These seem to be all the questions that were involved in that case, for the Court states:

"The scheme to defraud is well alleged", which seems not to have been disputed in the case.

In Kellogg v. United States, *supra,* it is directly that he "had devised a scheme and artifice to de- " fraud by inducing", etc. (see page 324), and " said scheme and artifice was to be effected by " opening correspondence.

In O'Hara v. United States the indictment contained the following:

> "Which said misuse of the Post Office establishment of the United States was then and there a part of said scheme and artifice to defraud" (page 552).

In Durland v. United States, 161 U. S. 314, it appears that

> "it is contended that the indictment should either recite the letter, or at least by direct statement show their purpose and character and that the names and addresses of the parties to whom the letters were sent should also be stated. It may be conceded that the indictment would be more satisfactory if it gave more full information as to the contents or import of these letters so that upon its face it would be apparent that they were calculated or designed to aid in carrying into execution the scheme to defraud, but still, we think that as it stands it must be held to be sufficient."

A mere passing analysis of these different cases will, we believe, show that they are distinguishable from the case at bar, and that the questions involved there were not the precise questions to be determined in this case.

Dalton v. United States, 127 Fed. Rep. 544
(a prosecution under Sec. 4480),

is subsequent to any authority referred to by the learned Court in its opinion. It was not cited in brief of counsel. Circuit Judge Jenkins, in delivering the opinion of the Court of Appeals, quotes approvingly from Pettibone v. United States, 148 U. S. 197, as follows:

> "The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, *if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication.* The charge must be made directly, and not inferentially or by way of recital. United States v. Hess, 124 U. S. 483, 486 (8 Sup. Ct. 571, 31 L. Ed. 516). And in United States v. Britton, 108 U. S. 199 (2 Sup. Ct. 531, 27 L. Ed. 698), it was held, in an indictment for conspiracy under Section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676), that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."

And the Court says:

> "Every particular of the scheme must be directly and positively averred."

It is respectfully submitted that a rehearing should be granted.

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We hereby certify that in our judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

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